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AN ILLUSTRATION OF LEGAL DEVELOPMENT—THE PASSING OF THE DOCTRINE OF RIPARIAN RIGHTS

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Contemporary with the recent and very rapid industrial development of the United States has been observed an unexampled liberality of juristic thought. Especially has the process of settlement and industrialization of the West been pervaded by certain unusual social and economic influences, and likewise has been comparatively free from that judicial conservatism prevalent during the periods of colonization and settlement of the eastern and central portions of the country. Extremely dynamic forces, finding their origin in the manner of settlement, the physical characteristics of the country, and the personal attributes of the population, readily developed what may be termed specialized forms of social and legal institutions. As economic and political factors have become adjusted and a stable social poise has been approached, some of the diverging branches of the new sociopolitical life of the West have been pruned back to antecedent form, but others have become component parts of a permanent organization. Incident to the perpetuation of an unusual industrial structure, there have come about the development of new legal concepts which have assumed special relation to property rights in natural resources. This was possible only upon the abrogation of common law precedents and the renunciation of doctrines formerly conceded to be fundamental in American practice.

It cannot be asserted that the tendency to innovation evidences a changing conception of the aim of the law, but rather a recognition of the original or primitive relativity of its process and object. In this conception of law and lawmaking forces, remote experience need not govern present methods, and established precedents do not necessarily set forth, either in detail or in principle, law sufficient to actual

and potential needs.¹ The formation of rules of action in harmony with prevailing and potential environment is properly designated as *scientific*, when contrasted with the legal orthodoxy of following precedent for no other reason than that of custom. That is not an unusual juristic philosophy which grants prevalence to time-established principles, solely because of former recognition and application, *proprio vigore*—considerations which may neither find their source in the actualities of a dynamic society nor their object in a harmonious socio-economic adjustment. The development of a wholesome regard for circumstantive and collective consideration in legislative and judicial processes is now commanding wide attention and is entirely salutary. Cases in point are not lacking. The absolute right of private property, the revered function of the last will and testament, and the domain of freedom of contract are rapidly being invaded; and an innovation which strikes even deeper into the vitals of the common law is exemplified by the progressive abrogation of the doctrine of riparian rights.

That portion of North America lying west of the ninety-seventh meridian, composing over 40 per cent of the United States and a considerable proportion of Canada, receives an insufficient rainfall for the ordinary needs of agriculture. Of this area, a portion comprising seven States and two territories,² together with the major portion of the Northwest Territories of Canada, is generally arid, having an annual precipitation less than half sufficient for the maturing of farm crops. Seven federal States³ and a corresponding proportion of Canada are semi-arid. Certain sections of these States lie within the rain belt and other sections are arid or subject to intermittent years of aridity.

The steadily accelerating settlement of this western country, extending over an entire period of little more than fifty years, and in most districts of less than half that time, occupies a dynamic era of economic development and exponential growth of legal institutions

¹ Deane Mellville M. Bigelow, of the Boston Law School, has recently admirably presented this *scientific* conception of the law. See *New National Forces and the Old Law*, *Atlantic Monthly*, December, 1906.

² California, Colorado, Idaho, Montana, Nevada, Utah, Wyoming, Arizona and New Mexico.

³ Kansas, Nebraska, North Dakota, Oregon, South Dakota, Texas and Washington.

without precedent in the history of the Anglo-Saxon race. Notwithstanding the facts that irrigation is one of the oldest arts of civilization, that the greatest nations of the ancient world maintained dominion for centuries in a rainless climate, and that, at the time of the first diversion of a western stream for the purpose of irrigation, 135,000,000 acres in foreign countries were being artificially watered and were sustaining dense populations, Anglo-Saxons are not known to have attempted the reclamation of arid lands until 1847.⁴ Since the beginning of history, this conquering race has been content to take for itself the humid parts of Europe and America while its weaker Romance rival has been confined to the supposedly less productive arid reaches of the continents. With the occupation of Utah,⁵ California,⁶ Colorado,⁷ and the succeeding States of the mountain and Pacific groups, came the realization of unfamiliar climatic conditions which could only be met by modified industrial methods. Unusual physical conditions and a necessarily revolutionized system of industry at once reflected themselves in social relations and customs. It is a recognized axiom of social law that economic conditions, in themselves extraordinary, tend to give rise to equally unique political institutions. For this reason, there is being brought about in Western America an innovation in Anglo-Saxon law which promises to fall not far short of a revolution in our system of juristic thought and legal construction.

Of special significance, is an independent and scientific development of rights of user in inland waters, and, at the same time, an unconscious recognition of the fundamental principles of a social theory of property, in so far as property may be made to comprehend rights to the use of streams, lakes, submerged waters, and glacial snows for the purposes of agriculture and mining. In spite of the more or less general recognition of the postulates of the common law of England, contemporary with early Anglo-Saxon sovereignty, the innovation was facilitated by virtue of the former prevalence of the civil law and the lapse of recognized precedent incident to the transfer of sover-

⁴ The Mormon colonists of Utah first diverted the waters of City Creek, near Salt Lake City, for the purpose of irrigation in the summer of 1847.

⁵ 1847.

⁶ 1849.

⁷ 1859.

eighty from France, Spain, and Mexico. The civil law is itself native to the arid lands of southern Europe, and its construction of the law of waters is accordingly in marked contrast to that of the English law. However, a loose application of the principles of the civil law under Mexican administration was not of itself sufficient to substantiate present juristic doctrines of the arid country. Even in the cosmopolitan settlements of the early West, a dominating respect for English legal principles was apparent. The significant factor of the situation lies in the fact that, in the absence of an effective ultra-conservative element, society found itself in the position of choosing from the two historic systems of jurisprudence the parts of each best suited to its economic needs. With regard to the law of inland waters, the choice of legal principles was deliberate, and the rapid development and elaboration of these principles has been generally quite positive in the recognition of a scientific relativity of law, economic expedience, and social welfare.

The political divisions of the arid West, in both Canada and the United States, have abrogated the common law doctrine of rights in inland waters by constitutional provision, statute, or judicial decision.⁸ The States have been free to act for themselves upon the question of water rights within their boundaries,⁹ but the status of rights in interstate streams, especially where the States concerned are partisan in their attitude upon principles of riparian rights, presents a problem of no small significance and one whose solution is delegated to the

⁸ In the seven arid States (see note 2), with the exception of California and Nevada, and in the Northwest Territories the abrogation of the common law doctrine was accomplished by statute or constitutional provision. California nominally retains the common law. Nevada, after having followed California's common law precedents for many years, through the supreme court, reversed all previous holdings, as being irrelevant to existing climatic conditions (*Jones v. Adams*, 1885, 19 Nev., 78; *Bliss v. Grayson*, 1889, 56 Pac., 231), which decision has since been enacted into statute. In California and the several States of the semi-arid belt, the common law of water rights has been so distorted by statute and judicial decision as to amount to a practical nullification of the doctrine of riparian rights.

⁹ The States assumed nominal as well as actual freedom in the control of natural waters within their boundaries upon the passage of the federal acts of 1866 and 1870. These acts were supplementary in making public lands, then occupied and to be occupied or appropriated, subject to prevailing local laws and customs.

future.¹⁹ The wide significance of the question at issue, in its relation to the respective fields of national economy and legal theory, justifies a brief review of the evolution of the respective doctrines of *common law riparian rights* and *priority of appropriation and beneficial use* of inland waters.

The United States inherited from Europe two systems of jurisprudence—the *common law* of the New England colonies from England, and the *civil law* which came through Florida, Louisiana, and Mexico, from France and Spain. The geographical extension of the common law, as occupation and settlement moved south and west, is familiar, as is also the nature of the corresponding decline of the civil law of the French and Spanish colonies as they gave place to federal authority.

THE COMMON LAW DOCTRINE OF RIPARIAN RIGHTS

The elementary principles of the common law doctrine of riparian rights are clearly stated in the *Corpus Juris Civilis*, as recorded by

¹⁹ The question of rights in inter-state streams for purposes of irrigation was recently brought before the Supreme Court of the United States in such a way as to directly involve the respective claims of the common law and the western doctrine of priorities. The case in question (*Kansas v. Colorado, et al.*) concerned rights in the use of the waters of the Arkansas River—an inter-state stream having its headwaters in Colorado and flowing through Kansas. Colorado, being an arid State, appropriated the waters of the Arkansas for purposes of irrigation in accordance with the so-called doctrine of appropriation. Kansas invoked the doctrine of riparian rights under the common law to force Colorado irrigators to release the waters of the stream that they might flow without diminution and in their natural channel for the benefit of the riparian proprietors of a somewhat less arid territory. The defense of Colorado rested, first, upon the question of actual diminution of the flow of the stream within the State of Kansas, and, finally, upon the natural conditions and necessities of an arid climate supported by the doctrine of appropriation, as incorporated in the constitution of the State and sanctioned by the constitutional powers of Congress together with the provisions of the national statutes as found in sections 2339 and 2340, U. S. Revised Statutes. A third contention was introduced into the suit by the filing of a petition in intervention, on the part of the United States, disclaiming the justice of the claims of either party to the suit, as affecting the rights of the government under the reclamation act and as original owner in the settlement and sale of lands belonging to the United States. After long deliberation, the court appeared unwilling to take advanced ground upon the question of water rights on inter-state streams and temporized the entire matter by dismissing both the petition of intervention and the bill of the State of Kansas without prejudice to the rights of either to renew the claims upon similar and sufficient grounds. (*Kansas v. Colorado, et al.*, decided May 13, 1907.)

Justinian, which establishes the origin of the present law. Riparian rights, as there set forth, secured to the public certain uses of navigable streams and of their banks as against landed proprietors bordering such streams.¹¹ The titles of the *Pandects of Justinian* which form the basis of the common law rights, refer only to navigable streams and the use of their waters. Their terms are prohibitory upon the proprietors of riparian lands, and recognize the right of all such uses by riparian dwellers as will permit streams to pass from their lands with their efficiency for public use unimpaired, thus granting privileges of domestic and mechanical use and inferring privileges not at all inconsistent with irrigation.

Although certain provisions of the Roman law were resolved into an axiom of the common law of England, the fact remains that the riparian doctrine taken over by the English did not exhaust the resources of the Roman law respecting the use of water. Natural streams were widely used for irrigation, even in Roman days, and a substantial body of law pertaining thereto, having no utility under English economic conditions, was not perpetuated. The law, as preserved in the *Pandects*, not only demonstrates the fact that English practice has not sounded the depths of the Roman law, but that American innovations, even to the degree of abrogating the riparian right of the common law, may not reverse any Roman precedent.

Having become an English institution, the doctrine of riparian rights was further modified. The most remarkable modification was the extension of the law of navigable and tidal waters to include inland and non-navigable streams. In formally effecting this expansion, Lord Selborne, in a decision and opinion, even now cited as a comprehensive statement of the common law, said: "There is no distinction in principle between the riparian rights on the banks of navigable and tidal, and on those of non-navigable rivers."¹² Soon there-

¹¹ The language of the Roman law is as follows:

"Uses of a river for navigation or of its banks for tying boats and landing cargo are public, but banks and all thereon growing are property of those whose land they adjoin." (Justinian, *Digest*, 43, 12, i.)

"Whatever in a public river or on its banks you do, or whatever into a public river or upon its banks you put, whereby the landing or navigation is made worse, you shall restore the former condition." (Justinian, *Digest*, 43, 12, 1, 19.)

¹² *Lyon v. Fishmongers Co.*, 1 App. Case, 662.

after England extended and applied the same law to the shores and waters of inland lakes. As a result of the English transformations, the original object of the riparian right—a guarantee of public use against riparian claimants—was entirely lost, and the law became the remedy of certain private owners against other proprietors and against the public as the claimant of resources unappropriated.¹³

As modified by English practice, the doctrine of riparian rights was incorporated in the organic law of the United States.¹⁴ For many years, what may be called an ultra-conservative defense of this doctrine has been assailed in America, especially in the western areas. In England, the chief significance of the law concerns tidal waters, although the principle is declared alike applicable to other streams. In America, the unusual size and the commercial and industrial importance of many rivers above tidal waters transfers the most important sphere of riparian rights to inland waters not tidal. American inland waters not only represent economic factors unknown in England, but streams and lakes of western America are of industrial importance not conceivable in the States of the East. Southeastern

¹³ Chancellor Kent's definition of riparian rights has met with universal approval within the jurisdiction of English practice: "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant or an uninterrupted enjoyment of twenty years which is evidence of it." (3 *Kent's Comm.* 439.)

¹⁴ In its generally accepted form, the doctrine of riparian rights, as applied in the United States, is as follows: "The water of permanent running streams and of inland lakes is sacred to the common use alike of all riparian proprietors upon their borders. Each proprietor may use the water for all reasonable purposes as it passes through or by his land, provided that he does not interfere with the public easement of navigation in all navigable lakes and rivers; but he must, after its use, return it without substantial diminution in quantity or change in quality to its natural bed or channel, before it leaves his own land, so that it will reach his adjacent proprietor in its full original, and natural condition. . . . More extensive or exclusive rights than these against other riparian proprietors can only be acquired by grant from them, or by prescription which presumes a former grant." (Black's *Pomeroy on Water Rights*, p. 4.)

and central States have modified the letter of the doctrine to meet their physical and industrial conditions, and the federal government, through the supreme court, has acknowledged the necessity of their action.¹⁵ The use of flowing streams for lumbering and water power, comparatively insignificant in England, has been of much consideration in America, and for this reason liberal interpretations of the common law have occurred with increasing frequency and latitude of application. With the settlement of the West, still more extraordinary physical conditions were encountered and everything possible was done to control the new situation by the old law.

In the evolution of riparian rights, the redefining of significant terms of the old formula has proved a resourceful practice. "Reasonable" or "ordinary" uses of natural waters, as prescribed by the old law, was originally ascertained by the determination and satisfaction of *natural* as opposed to *artificial* wants. A reasonable use, therefore, was such as was absolutely necessary to man's existence, and unreasonable and forbidden uses ministered merely to the artificial wants of increasing comfort and prosperity. Under more recent judicial decisions, however, is observed a reconstruction of the "ordinary" use justifying, even in England, a modified legal acceptance of the term which becomes more and more flexible as the situs of its application moves westward to the Pacific States. The forbidden "diminution" of the flow or "change" in the quality of the stream has been modified by the introduction of the conveniently elastic adjective *substantial*, which is interpreted to infer nothing less than a measurable injury to riparian proprietors above or below, and has frequently been held to justify such use of streams as shall inflict the least possible injury to other proprietors consistent with the exigencies of the case.¹⁶

¹⁵ 7 Wall., 272, 11 Federal Rep., 389.

¹⁶ Modern practice in the United States has evolved the following *arid region* definition of riparian rights under the common law: "Every proprietor of land on the banks of a natural stream has an equal right to have the water of the stream continue to flow in its natural course as it was wont to run, without diminution in quantity or deterioration in quality, except so far as either of these conditions may result from the reasonable use of the water for irrigation or other lawful purpose by upper proprietors. He may himself use the water for necessary purposes in a reasonable manner, having due regard to the rights and needs of other proprietors, provided he returns to its natural channel, before it leaves his estate, all the water not necessarily

Resort has also been had to a redefining of "riparian lands" with respect to the nature of their title and the limits of their extent back from the stream. Court decisions have actually denominated lands of one watershed as riparian to streams of another. The diversion and return of water at points upon the land of the appropriator has been widely held by both courts and statutes to be an unessential element of the common law doctrine, and right of way has been acquired, through condemnation proceedings, over the estate of another.

The use of riparian waters for irrigation, while broadly held to be artificial or extraordinary and in conflict with the common law, has been conceded, under varying constructions of a "reasonable degree," not only in the nine common law States of the West, but also by the supreme courts of eight humid States¹⁷ several times by the federal courts, and in at least five scattering cases in England. The consumption of all the water of a natural stream for irrigation, to the exclusion of lower proprietors, has frequently been held permissible.

A unique defense of the appropriation of water for irrigation in California and the recognition of priorities under the nominally prevailing common law is based upon the presumption of a grant. Under the common law, riparian rights of an extraordinary nature and for unusual purposes may vest by virtue of a grant or prescription, which may be presumed after an uninterrupted use for twenty years. It is seriously advanced that the United States, as lawful proprietor of public lands and inland waters, abetted by the state of California, through financial assistance and legal protection, permitted and promoted the diversion of water for irrigation, and that such permission and encouragement, continued for a sufficient number of years, becomes adequate grounds under the common law for the presumption of a grant of perpetual right.¹⁸

consumed in his own lawful use. The right of the riparian owner is limited to a simple usufruct in the water as it passes along, and does not include a proprietorship in the water itself." (*Long on Water Rights*, ch. ii, ¶9, and cases there cited.)

In the arid districts, the general question of a riparian right touches the authority of the proprietor to take water from the stream, while in the earlier jurisdiction of the common law the right to a continuous flow was more frequently sought.

¹⁷ Alabama, Connecticut, Maine, Massachusetts, New Jersey, New York, Pennsylvania, and Wisconsin.

¹⁸ Opinion of Judge Heydenfeldt in *Conger v. Weaver*, 6 California, 548.

It is not maintained that all interpretations and modifications of the common law doctrine noted above are now considered good law and of general application, but a half century ago such pronouncements would have cast serious reflection upon the mental processes of their author. However, as established common law precedents now stand, there is apparent a strong evolutionary tendency in the general interpretation and application of the riparian doctrine, even in districts which do not include arid lands. Changed physical and economic conditions have so modified the subject matter of property, the protection of which is the object of the law, that jurists have, of necessity, expanded the terminology of the law and taken exception to its earlier intent. The action of several western States, in the nominal retention and strained interpretation of the common law, is proof that natural conditions make expeditious and imperative a modified conception of its spirit if, in name, it is to be retained.

Excepting California, the arid States and territories of the West, together with provinces of Australia and the northwest territories of Canada, have formally abrogated the common law as affecting the use of flowing waters. As to the action of California and the semi-arid States, in its nominal retention and open violation, it is a question whether they have extended the right of riparian ownership beyond that vested at common law and have entirely subverted and destroyed common law rights in inland waters. Optimistic views of the situation in California¹⁹ would make it appear that the common law doctrine of riparian rights and the doctrine of appropriation for beneficial use have come to rest amicably side by side in that State; that the two principles underlying property in water are not only non-contradictory but, in fact, harmonious and supplementary.²⁰ Such an attitude may be justified on the part of a practitioner at the bar of the State in question; but it is incredible that two doctrines of law having

¹⁹ The southern part of California is distinctly arid, and highly developed agricultural industry demands a most scientific and economic distribution of water for the purposes of irrigation. The humidity of the State increases with the latitude and the northerly portions are not confronted with the serious problems of extreme aridity, peculiarly productive horticultural lands, and insufficient water supply. For this reason, economic interests differ widely in different sections of the State, and to this cause may be traced the incongruity of existing laws.

²⁰ Wiel, *Water Rights on Western Streams*, §14.

different origins, contradictory objects, and conflicting principles of theory and application should be made to yield to harmonious and supplementary application in establishing security of property in the resources of the same stream. It is likewise to be doubted that the highest possible industrial development may be attained under this dual system. Such incredibility is conclusively supported by the stream of water-rights litigation constantly pressing upon the courts of California and such other States as have attempted to emulate her dual system, when contrasted with the infrequent appeals to the courts in States like Wyoming.

THE DOCTRINE OF APPROPRIATION

The water laws of the States and territories identified with the abrogation of the common law doctrine of riparian rights are conceded to rest upon a theory of right in the use of water indigenous to the arid areas of the United States. This theory is not only antagonistic to the usages of the English doctrine, but invalidates its fundamental principle of property rights in inland waters.

During the occupation of the arid portions of the present national domain, previously recognized juristic institutions, in a measure, lost control of social forces. The civil law, incident to French and Spanish sovereignty, was of course annulled. The common law, little known and less respected, failed to command recognition as a general rule of procedure. The individualistic pioneer, struggling for mastery over a new country, naturally recognized expedience and right, appropriation and acquisition, as synonymous terms. Furthermore, judicial and executive agents were not sufficiently in evidence to give a positive force to any legal precedent which did not meet with the approval of the public and necessarily non-juristic mind. Under such conditions, social and legislative agencies, singularly untrammelled by inflexible conceptions of existing doctrines, entered upon the construction of custom and law unmindful of other considerations than those of economic and social welfare. In this way the doctrine of appropriation, as applied to the use of water, is said to have become indigenous to the United States, having been evolved upon the arid land of the West under conditions both socially and physically extra-

ordinary, although not at all unnatural. The abstract doctrine, or the principle and theory conveyed thereby, was without doubt of less modern understanding and acceptance than was its initiation in the United States. In fact, this principle was a component part of the Roman law and supplemental to the identical passages from which were drawn the English laws pertaining to property in natural waters.

In so far as present law is concerned, the nativity of the doctrine of appropriation was contemporary with the exploitation of the gold fields of the Sierra Nevadas, inaugurated in 1848. The lands upon which the precious metal was found belonged to the United States, but they were unsurveyed and were not legally open to occupation and settlement. Within a few months following the discovery of gold in the sands of California, the cañons and mountain valleys of the district were populated by thousands of fortune seekers. They recognized no code of law, and possessed no trained legislative, judicial, or executive agents; but the admiration for order and system inherent in the Anglo-Saxon race soon put on foot a semblance of law and administration. Miners held meetings in various "bars," "diggings," and "camps" and enacted regulations by which, in lieu of other law, they agreed to be governed. These codes provided for a measure of security of persons and property, and their administration was singularly effective. The laws of the United States, as they were applicable to this country, vested title in real property in no one except by virtue of a few preëxisting Mexican grants recognized upon the accession of California by the federal government. Local legislation could not authorize property in natural agents, as against the United States; but, as among private persons, such legislation was justifiable and most necessary if industrial development was to persist.

The object of the codes of the early Californians, aside from that of personal safety, was to secure, within practicable limits, equity of right and privilege in acquiring and operating mines, and to secure justifiable property in natural resources. To best accomplish this, he was made first in right of property who was first in time of possession, and his utilization of that right gave him a valid claim against all others except the nation. Discovery followed by appropriation was recognized as a basis of title, and a specific amount of use or of development of the property thus acquired was a necessary adjunct

to its retention. This principle of proprietorship had been strongly defended throughout the colonial periods of American history, and has long been the basis of the federal land policy.

Flowing water assumed a relation to the industry of the West, by virtue of the necessity of its use in both mining and agriculture, comparable in importance to that of the placer sand, the quartz vein, or the soil itself. Each was worthy of a use, each was limited in amount, and if a rule of appropriation and use was justifiable as an essential of the realization of property rights in the one, it appeared likewise a worthy essential of property in the other. So the economic law of expedience and a sense of justice declared that he who first turned the waters of a stream from its course, or of a lake from its bed, and applied them to beneficial use was first in a right commensurate with that use. This doctrine was inaugurated by the placer miners of California and, for a time, defended as their exclusive prerogative, but the application of a stream of water to an area of placer sand for the direct extraction of gold differs not, in principle, from the appropriation of a stream to an area of land for the creation of value through the medium of agriculture. Upon these premises was established the doctrine of priority of appropriation, by which has been defined the basis of property in water in the arid districts of America.

Until 1851, the status of the law in the West remained as formulated by the miners in their codes of local authority. In that year, the first legislature of California gave those voluntary regulations legal and compulsory efficacy by statute. For eighteen years, the local codes, as sanctioned by statute and moulded and applied by the courts, constituted the law governing property rights in mineral lands and flowing waters on the public domain. The sale of mineral lands was not authorized until July 26, 1866. In the first section of the act of that date, it was declared that mineral lands of the United States were free and open to exploration and occupation, subject to such regulations as might be prescribed by law and the local customs or rules of the inhabitants of the several districts, as far as the same were not in conflict with the laws of the United States. The act further provided that water rights established by priority of possession should be maintained and protected, and the right of way for canals and ditches for the purpose of diverting water for mining, agriculture, or mechanical

use was acknowledged and confirmed.²¹ The United States supreme court has designated this act as "a voluntary recognition of a pre-existing right of possession, constituting a valid claim to continued use." By this law, proprietors were enabled to establish permanent rights by government patent, and, by an act of July 9, 1870,²² all subsequent patents were issued subject to previously vested water rights.

The federal statutes mentioned above paved the way for formal abrogation of the common law doctrine of riparian rights throughout the arid regions and confirmation of the new doctrine of appropriation, as applicable to both land and water. Prior to these enactments, however, the people of California found themselves confronted by the proposition of choosing between the two doctrines. It is charged that legislators were unfamiliar with conditions prevailing throughout the State and that certain special interests exercised an undue influence in the constitutional convention. In any case, the people of the State permitted the doctrine of appropriation, in so far as it pertained to the establishing of water rights, to be abandoned. In the constitutional law of the State, the simple customs evolved from natural conditions and frontier necessities were made the basis of the mining law, and upon this foundation has been developed what is perhaps the best body of mining law extant. In establishing water rights, however, the principle which had proved of equal efficacy in the acquisition and control of water and in the acquisition and control of mineral lands was disregarded, and the common law was declared to obtain throughout the State. At this period in the history of California, began a conflict of legal principles and economic factors which has materially injured the industrial development of the State by making title in highly efficient forces of production so insecure as to discourage their appropriation and reclamation.

For over half a century, the doctrine of appropriation, as worked out by the miners of California, has served as a basis in the construction of water law in the West. However, the doctrine has not remained without amendment, and its extension has been fraught with confusion and difficulty. Advocates of the common law, especially in the

²¹ 14 U. S. Statutes, 253.

²² 16 U. S. Statutes, 217.

semi-arid States, have been active in opposing any legislation of contrary principle. The history of California reveals a determined and unsuccessful attempt to harmonize the two doctrines of water rights of contradictory fundamental interpretations. One has been destructively expanded and the other has been so confined as to destroy its broadest usefulness. Nevada emulated the dual system of California until, in 1889, hopeless entanglement caused the supreme court of the State to reverse its former rulings and adopt a positive theory applicable to the economic use of water in that State. As the several States and territories of the arid country have successively recognized and applied the principle of appropriation, the nature of its elaboration and the manner of its administration have varied within wide limits, but the primary principle remains unchanged.

An important tendency in the evolution of the law has been its recognition of different uses to which water may be applied. First designed to apply only to the gold placers of the Sierras, the law was soon extended to recognize agricultural and mechanical uses on a par with mining uses. In some States, notably Colorado and Wyoming, social and industrial progress dictated a changed order of importance and the agricultural use has come to be recognized as most essential and primary. Because of the varying intensity of needs in the different uses, the law was made to meet the order of the uses as well as to recognize the order of appropriation.

Colorado was the first State to incorporate the doctrine of appropriation in its constitutional law. The provisions of the Constitution of that State, relating to title in the use of waters, promulgate this doctrine in its generally accepted terms; and the laws of other States and territories recognizing the principle of the doctrine are derived from the Colorado law.²³ This law denies the riparian proprietor, as such,

²³ The provisions of the Colorado Constitution relating to the subject are as follows: "The water of every natural stream, not heretofore appropriated, within the State of Colorado is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided." (Art. xvi, sec. 5.)

"The right to divert unappropriated waters of any natural stream for beneficial use shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the services of all those desiring to use of the

any rights; that is to say, he has no usufruct of the water flowing in natural streams not open to others whose estates are non-riparian. The State asserts a sovereign ownership over the resources of all natural streams and vests a right of user in those who properly apply their waters to domestic, agricultural, or other purposes. The location of the lands of the user, with respect to the position of the stream, is of no legal consequence. They may border the stream or be remote therefrom. In fact, no reason appears why the streams of one watershed may not be diverted for the benefit of the lands of another, and such action has been sustained by the courts of both Colorado and Wyoming.

The development of the considerable body of irrigation law of the West has been entirely utilitarian, and proceeds upon the principle of economic policy. Its evolution has been rapid and its methods have been in harmony with efficient utilization of natural resources and, in the main, with equitable distribution of their use. It may justly be said that the courts have generally led in the movement of common law nullification and legislatures have been content to sanction the acts of the courts.

The new doctrine of water rights is not free from criticism and will invite frequent modification because of the wide and constantly changing economic sphere of which it is a part. Socio-economic conditions growing out of an inevitable dense population of irrigated areas—intensive and diversified culture, high water values, and coöperative enterprise—will demand a perfection of the law to which that of the present is rudimentary. Under present law, merely the right to irrigate and crude methods of administration are established. The exact nature of property in water for irrigation is not defined, nor can it be until industrial conditions become stable, for the nature of the right must be in harmony with the economic interests involved. The law reaches no conclusion as to the proper source and extent of administrative authority, and uniformity is not yet approximated. Interstate and international problems have not even been approached. The subject matter of domain was formerly considered to be immobile,

stream, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes over those using the same for manufacturing purposes.” (Art xvi, sec. 6.)

but now there appears a factor of real property which may not be confined within political boundaries. As long as conflicting property rights are maintained in adjacent States, inter-state difficulties will not be avoided. The Arkansas River, of Colorado and Kansas, is but one of numerous streams concerned, and its lands in Colorado, yielding an annuity of ten millions, represent only a trifling factor of the inter-state interests involved. Along the course of the Rio Grande, the State of Colorado, the territory of New Mexico, and the republic of Mexico still contend for exclusive privileges conferred by conflicting laws.

In spite of the many imperfections of the infantile legal institution based upon the doctrine of appropriation, its permanence is assured in America. It emerges from a conflict between the rule of precedent and judicial inertia on the one hand, and predominating economic forces on the other; between a time-honored anemic institution, and custom called into being by the necessary intensive application of natural utilities to social needs. The first was native to humid England prior to the industrial revolution, and the second is the natural outgrowth of the industrial conquest of a country of aridity, non-navigable streams, and superabundant lands. The one is reluctant to forfeit historical privileges and practices which are irrelevant under given conditions; the other recognizes national economy and collective interests, and contains the germ of an order of rights in industrial forces which bids fair to promote a scientific modification of existing conceptions of property.